No. 96-318

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DARYLL RICHARDSON and JOHN WALKER,
Petitioners,

v.

RONNIE LEE MCKNIGHT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Are employees of a private, for-profit corrections corporation which performs some of the duties traditionally carried out by a state department of corrections entitled to assert qualified immunity in an action for damages under 42 U.S.C. § 1983?

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INTEREST OF THE *AMICUS CURIAE*

The American Federation of Government Employees, AFL-CIO, ("AFGE") submits this amicus brief in support of respondent McKnight, who filed suit against petitioners under 42 U.S.C. § 1983 alleging that they had violated his Eighth Amendment rights. Specifically, AFGE joins respondent in arguing that qualified immunity from a § 1983 action is not available to employees of a private, for-profit corporation, which has contracted with the state of Tennessee to manage correctional facilities.[1]

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[1] Counsel for respondent, Ronnie Lee McKnight, and for petitioners, Daryll Richardson and John Walker, have consented in writing to the filing of this brief.

AFGE represents some 700,000 federal and District of Columbia government workers, including federal prison guards. Congress recently authorized the privatization of one federal corrections facility, on an experimental basis, and has considered a more widespread use of private contractors to maintain federal penal institutions. The Union has strenuously opposed efforts to contract these, and other, core functions of the government.

Federal officers and employees can be held liable for money damages for unconstitutional conduct committed during the course of their employment. *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Although this case arose under 42 U.S.C. § 1983, the Court has traditionally not distinguished between suits alleging constitutional violations under § 1983 and those brought directly under the Constitution when resolving claims of official immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("it would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.' "). Therefore, a ruling in this case will undoubtedly affect federal employees, and AFGE bargaining unit members, who are competing with contractors to retain in-house, the performance of federal functions.

STATEMENT

Amicus adopts respondent Ronnie Lee McKnight's Statement of the Case.

SUMMARY OF ARGUMENT

Petitioners' demand for official immunity from suit for acts committed while carrying out their duties as privately employed prison guards must be rejected as lacking either an antecedent in common law or a justification based upon public policy.

Federal and state governments are under increasing political and economic pressure to contract out their functions, even those, such as guarding prison inmates, which are arguably core or inherently governmental. Proponents of privatization, most notably those hoping to be awarded such contracts, often disparage the public sector as inefficient and hampered by process. Although the cost-effectiveness of "contracting out" is dubious, in our view, its advocates routinely commend the private sector precisely for being unencumbered by perceived constraints on governmental conduct.

Public officials and employees are obliged to carry out their mission within the parameters of constitutional, statutory, regulatory, and political imperatives which have the public interest as their sole object, and which are designed to maximize public accountability. Conversely, the primary, and legitimate, purpose of private enterprise is to generate a profit for its investors. While the government may "contract out" a function, the contractor's performance is fundamentally controlled by its business purpose, which may, or may not, conform with the public interest, and which may, or may not, withstand the exacting standards applied to government conduct.

Service to, and accountability for, the common good is the bedrock of public employment, from hiring to retirement, from the highest office to the lowest position. These fundamental precepts clearly distinguish it from private enterprise in a way that warrants application of immunity in one setting, but not the other. The divergent purposes of the public and private sectors weigh heavily against granting these private employees an immunity, heretofore reserved for government officials, from suits alleging constitutional violations. The balance is tipped even further by the fact that a damages action under § 1983 may be the most effective means of ensuring that contractors remain accountable for their actions with regard to constitutional rights. This is especially true here, where the plaintiff is an inmate in a correctional facility already removed from public view and access.

Furthermore, as government contracts out more and more functions, the contractors' potential liability for constitutional violations may become the only realistic deterrent to unlawful conduct. Therefore, amicus AFGE respectfully asks that the Court affirm the lower court's decision holding that petitioners are not entitled to qualified immunity for unconstitutional acts committed in the course of their employment.

ARGUMENT

I. THERE IS NO COMMON LAW SUPPORT, OR PUBLIC POLICY RATIONALE, FOR EXPANDING THE DOCTRINE OF OFFICIAL IMMUNITY TO PRIVATELY EMPLOYED PRISON GUARDS.

This Court has consistently ruled that government officials possess some form of immunity from suits for damages caused by their official acts. *Harlow v. Fitzgerald, supra*, 457 U.S. at 807. Certain government officials, such as the President, legislators, judges, and prosecutors, generally enjoy absolute immunity from such actions. *Id.*; *Forrester v. White*, 484 U.S. 219, 224-226 (1988). For other governmental officers, however, qualified immunity is the norm. *Harlow, supra,* 457 U.S. at 807. As such, it shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow, supra,* 457 U.S. at 818.

In the instant case, Mr. McKnight alleged that petitioners, in their capacity as privately-employed prison guards, violated his Eighth Amendment rights. He brought this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, which provides, in pertinent part, that a cause of action will lie against "every person who, under color of any statute . . . of any State . . . subject, or causes to be subject, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws. . . ." 42 U.S.C. § 1983. The provision is designed "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole,* 504 U.S. 158, 161 (1992).

Section 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman,* 424 U.S. 409, 417 (1976). The Court has not, however, construed 42 U.S.C. § 1983 as signifying congressional revocation of the doctrine of immunity for government officials. *See Pierson v. Ray,* 386 U.S. 547, 554-555 (1967). Rather, that doctrine was deemed to be so deeply ingrained in the common law at the time of § 1983's enactment, and grounded in such strong policy concerns, that " 'Congress would have specifically so provided had it wished to abolish [it].' " *Owen v. City of Independence,* 445 U.S. 622, 637 (1980) *quoting Pierson v. Ray, supra,* 386 U.S. at 555. The Court has nevertheless been sensitive to the fact that by incorporating immunity defenses into § 1983 jurisprudence, it is "devising limitations to a remedial statute, enacted by Congress, which 'on its face does not provide for *any* immunities.' " *Wyatt v. Cole, supra,* 504 U.S. at 171 (Kennedy, J., concurring) *quoting Malley v. Briggs,* 475 U.S. 335, 342 (1986). Thus, at various times, it has warned against expanding the scope of the immunity based upon "free-wheeling" notions of policy or efficiency. *See e.g., Wyatt, supra,* 504 U.S. at 170-172.

The special policy concerns which do justify qualified immunity to government officials include the need to "preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service." *Wyatt v. Cole, supra,* 504 U.S. at 167. The essential purpose of qualified immunity is, therefore, "to safeguard government, and thereby to protect the public at large, not to benefit its agents." *Id.* at 167-168.

As respondent ably argues, the common law provides no basis for petitioners' contention that private parties are entitled to qualified immunity.[2] Similarly, this case implicates none of the policy concerns which, in the context of governmental actors, justify depriving injured parties of a cause of action for constitutional violations. Most damaging to petitioners' claim in this latter regard is the Court's unambiguous declaration in *Wyatt* that "rationales mandating qualified immunity for public officials are not applicable to private parties." *Wyatt v. Cole, supra,* 504 U.S. at 167.

In *Wyatt,* a private creditor, who was sued under § 1983 after attaching the debtor's property under the state replevin statutes, asserted a qualified immunity defense, which had been successfully raised by the sheriff and deputies involved in the seizure, on the grounds that he relied on a state law which he had no reason to believe was invalid. The Court rejected this contention, however, stating that while fairness might suggest that he be entitled to the same protection as that given to the sheriff and deputies, as a private individual, his interests were "not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion." In particular,

> . . . unlike public officials, private parties hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good . . . [nor would immunity] bear[] on whether public officials are able to act forecfully and decisively in their jobs or on whether qualified applicants enter public service . . . unlike with government officials performing discretionary functions, the public interest will not be unduly impaired if private individuals are required to proceed to trial.

[2] Amicus hereby incorporates respondent's arguments, and adds the following comments primarily to illuminate the concrete differences between public service and private enterprise which are relevant to the immunity question at issue here.

Wyatt v. Cole, supra, 504 U.S. at 168. Thus, the Court concluded that the "nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity." *Id.*

While the holding of *Wyatt* may be narrow, the Court's opinion certainly speaks to the broader issue of whether the scope of immunity can be enlarged to protect private parties from damages actions. In particular, it explains why the policies justifying qualified immunity for public officials simply do not apply to private parties. These policies are equally applicable here. That petitioners are employed by a corporation which has contracted with the government does not distinguish this case from *Wyatt,* or warrant the drastic departure from settled principles of immunity law which they seek.

As a threshold matter, it is axiomatic that persons do not acquire public office by virtue of a contractual relationship with the government to perform services. *See Metcalf & Eddy v. Mitchell,* 269 U.S. 514, 520 (1925) (contracts for services as consulting engineers, though entered into by authority of law, did not create an office or endow plaintiffs with status as officers or employees so as to be exempt from taxation.) In the federal government, for example, an officer is statutorily required to be appointed in the civil service by either the President, United States court, agency head or Secretary of a military department, to engage in the performance of a federal function under authority of law or Executive act, subject to the supervision of one of the aforementioned authorities while in the performance of that duty. 5 U.S.C. § 2104.[3]

[3] For purposes of the Civil Service Reform Act codified throughout title 5 of the United States Code, an "employee" is defined as any officer or individual, appointed in the civil service by the President, Member of Congress or the Congress, member of a uniformed service, another employee, head of a government con-

Despite their efforts to cloak themselves in the mantle of public office (pet. br. 33-46), petitioners do not possess the most basic prerequisites of that designation. Public policy "demands that an officeholder discharge his duties with undivided loyalty." 63 Am. Jr. 2d *Public Officers and Employees* § 319. He or she must have an undivided duty to the public whom they serve, and must act in the best public interest. *Id.* Specifically, a public office is "created for the purpose of effecting the end for which government has been instituted, which is the common good, and not for the profit, honor, or private interest of any one person, family, or class of persons." *Id.* at § 2.

These are not empty platitudes trotted out to bolster our contention that public service is different from private enterprise in a way that is relevant to the disposition of this case. On the contrary, these statements reflect principles which actually infuse government service from hiring to retirement, and apply whether one occupies the office of President or the position of clerk-typist in an obscure government agency.

For example, Congress has enacted a myriad of laws governing federal employees which are designed, or have been invoked, to protect the integrity of the federal government. Specifically, federal officials are prohibited from hiring or promoting relatives, or granting "any preference or advantage not authorized by law, rule or regulation to any employee or applicant." *See* 5 U.S.C. § 2302(b)(6) and (7); 5 U.S.C. § 3110. They are criminally liable for willful and corrupting interference with the hiring process. 18 U.S.C. § 1917. In addition, employees who falsify an employment application are subject to criminal sanctions, *see* 18 U.S.C. § 1001, in addition to being fired. *See Kissner v. OPM*, 792 F.2d 133 (Fed. Cir. 1986).

Applicants are, by law, subject to rigorous suitability examinations to ascertain their "fitness . . . as to age,

trolled corporation, or adjutant general who is engaged in the performance of a federal function under authority of law or an Executive act under the supervision of one of the foregoing authorities. 5 U.S.C. § 2104.

health, character, knowledge, and ability." 5 U.S.C. § 3301 *et seq.* *See also* 5 C.F.R. § 731. They may be further required to submit to security clearance investigations in the case of sensitive positions. 5 U.S.C. § 7531 *et seq.*

A federal employee's tenure in office is similarly circumscribed by proscriptions against conduct which conflicts, or even appears to conflict, with the government's interest. Government-wide regulations promulgated by the Office of Government Ethics ("OGE") state that "public service is a public trust" endowing each employee[4] with a "responsibility to the United States Government and its citizens to place loyalty to the constitution, laws and ethical principles above private gain." 5 C.F.R. § 2635.101(a). An entire chapter of Title V of the United States Code is dedicated to prescribing specific merit system principles and prohibited personnel practices that insulate government employment from the pressures, weaknesses, and temptations of the private sector and insure the undivided loyalty of federal civil servants.

The requirement of undivided loyalty pervades the federal conflict-of-interest laws, including prohibitions against bribes and graft, violations of which could subject employees to criminal and civil liability. *See* 18 U.S.C. §§ 201-209. Employees are further subject not only to the OGE's government-wide regulations noted above, but also, to each agency's standards of conduct.[5]

[4] The definition of employee for purposes of these regulations includes nonmilitary officers. *See* 5 C.F.R. § 2635.102.

[5] Standards of conduct governing employees of the U.S. Department of Justice, of which the Bureau of Prisons is a component, are published at 28 C.F.R. § 45.735 *et seq.* They provide, in part, that "[i]n all their activities, both personal and official, [employees] should be mindful of the high standard of behavior expected of them." 28 C.F.R. § 45.735-2. Another section identifies no less than sixteen *statutory* prohibitions on their conduct, including, *inter alia*, disclosure of confidential information (18 U.S.C. § 1905). 28 C.F.R. § 45.735-21.

In addition, employees may not advocate the overthrow of, or partictipate in, or assert, the right to strike against the government under pain of criminal sanctions, as well as removal. *See* 18 U.S.C. § 1918; 5 U.S.C. § 7301. Their political activities have long been restricted in order "to serve this great end of Government—the impartial execution of the laws" and to conform their official conduct with "the will of Congress, rather than in accordance with their own or the will of a political party." *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 565 (1973). *See also* 5 U.S.C. § 7321 *et seq.*

Restrictions on *post*-employment conduct equally demonstrate the level of fidelity expected of government employees. *See e.g.* 18 U.S.C. § 207. The essence of these restrictions is to prevent individuals from using their official positions for personal profit, or having their public duties compromised by the promise of financial gain.

Unlike the government, business is not constrained by these restrictions which are designed to ensure integrity of public employees entrusted with the public interest. On the contrary, such an enterprise is, by definition, ordered precisely for "the profit, honor, or private interest of any one person, family, or class of persons." Officers and directors of a corporate contractor have a fiduciary duty to act in the interest of the corporation. *See e.g., United States v. Bynum*, 408 U.S. 125, 137-138 (1972). This obligation is often viewed as encompassing a duty of loyalty to the corporation. *See e.g., Radol v. Thomas*, 772 F.2d 244, 256 (6th Cir. 1985) (applying substantive law of Ohio), *cert. denied* 477 U.S. 903 (1986). In fact, in some states, the duty imposed upon corporate officials is defined as one of "undivided loyalty" to the corporation. *See e.g., Seaboard Industries Inc. v. Monaco*, 442 Pa. 256, 262 (1971).

Because public service and private business are defined by fundamentally different purposes and duties, the mere performance of a governmental function does not transform the private contractor into a public servant for purposes of immunity. Nor do the Court's precedents, which recite the proposition that the conduct at issue is relevant to the immunity analysis,[6] require such a holding. On the contrary, all these cases deal with claims of immunity brought by governmental officials. That the actor claiming immunity must be, as a threshold matter, a governmental official implicitly, but necessarily, flows from the Court's repeated recognition that the purpose of qualified immunity is "to safeguard *government*." *See Wyatt v. Cole, supra*, 504 U.S. at 168 (emphasis added).

It is significant, therefore, that when presented with the opportunity in *Wyatt* to depart from this principle, and to extend qualified immunity to a private party, the Court declined to do so, even in the face of a strong countervailing argument that equitable considerations required the protection of private individuals who rely upon seemingly valid legal process, in the same way that government officials who enforce such process are protected. Thus, the Court of Appeals for the Sixth Circuit correctly read *Wyatt* as requiring not only an examination of the conduct at issue, but also in inquiry into whether extending immunity to private parties served the public interest. *See McKnight v. Rees*, 88 F.3d 417, 423 (6th Cir. 1996).

Moreover, it does not require special predictive powers to see that extending qualified immunity to anyone who ostensibly performs a governmental function will thrust courts into the morass of defining "governmental functions." For example, a judge performs judicial acts which render him or her immune from suit. But many actions

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[6] *See e.g. Forrester v. White*, 484 U.S. 219 (1988) (judge does not have absolute immunity from probation officer's suit alleging discriminatory discharge); *Harlow, supra*, 457 U.S. at 810-813; *but see Anderson v. Creighton*, 483 U.S. 632, 643 (1987) (FBI agent has qualified immunity from suit arising out of warrantless arrest) ("we have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated.")

and decisions taken by private individuals (employers readily come to mind) may be described as "judicial" insofar as they determine the rights and liabilities of other individuals. Yet no one would seriously contend that engaging in that function renders non-jurists immune from suit. Similarly, a private school teacher who inflicts corporal punishment is not rendered immune from suit for resulting injuries simply because he or she engages in a function which is also performed by a vast number of public employees. Likewise, there are a host of functions, such as postal delivery, which were once carried out by the government, but are increasingly within the purview of the business sector. Will businesses be immune from suit because they are engaging in a function that was at one time considered to be purely governmental?

The limiting principle implicit in petitioners' argument seems to be that they deserve immunity because they have contracted with the government. If so, then the crux of their position is that a party's status, i.e., as "contractor," entitles it to immunity. However, for all the reasons noted above, it is abundantly clear that a private contractor, even while performing a governmental function, does not stand in the stead of a public officer or employee.

II. EXTENSION OF QUALIFIED IMMUNITY TO PRIVATE CONTRACTORS WOULD UNDERMINE THE BALANCE BETWEEN PROTECTING THOSE INJURED BY UNCONSTITUTIONAL CONDUCT AND PROTECTING GOVERNMENT'S ABILITY TO PERFORM TRADITIONAL FUNCTIONS.

"Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt v. Cole, supra*, 504 U.S. at 167; *see also Harlow, supra*, 457 U.S. at 813-814 ("Resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative.") Where, as here, an action for damages is the "only realistic avenue for vindication of constitutional guarantees," granting immunity heightens the risk of injury due to unconstitutional conduct. *See Harlow, supra*, 457 U.S. at 814. This heightened risk is not offset by any discernible benefit to the government in extending immunity to its contractors.

The limited accountability incident to privately maintained prisons increases the probability of unconstitutional conduct. A prison, even one run by government officials, is an environment "where the door is closed, not open, and where there is little, if any protection by way of community observation." *Cleavinger v. Saxner*, 474 U.S. 192, 205 (1985). A privately run facility poses an even greater threat of unconstitutional conduct because it lacks certain safeguards, present in a publicly run prison, which assure a significant degree of public accountability.

For example, publicly employed guards and other prison personnel are protected in a variety of ways from retaliation for exposing abuses. Prison guards employed by the federal Bureau of Prisons, for instance, cannot be terminated from employment without cause. *See* 5 U.S.C. § 7513. Moreover, the Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16 (1989), affords them a significant degree of protection from retaliatory actions should they attempt to disclose unlawful conditions or conduct by other government officials. Such protections exist for a vast number of federal and state employees.

Conversely, the overwhelming number of non-public employees are employed "at-will." *See Buethe v. Britt Airlines*, 787 F.2d 1194, 1197 (7th Cir. 1986). This means that an employer may fire an employee "for good reasons, bad reasons, or no reasons, without incurring liability." *Id.* In *Buethe*, for example, the plaintiff, a pilot, brought a wrongful discharge action alleging that he was fired for refusing to fly an unsafe plane. Although the plane was apparently defective, the court of appeals affirmed the dismissal on the grounds that Indiana's tort of

wrongful termination law did not extend to whistleblowing. *Id.* Facing termination for exposing unlawful treatment of prison inmates poses a clear disincentive for employees to assume the responsibility for ensuring the constitutionality of the contractor's performance.

The threat of unconstitutional conduct is further exacerbated in the privately run prison by the inapplicability of certain public access laws to private enterprises. For example, in the federal sector, the Freedom of Information Act, 5 U.S.C. § 552, represents a statutory mandate for a level of public access and scrutiny unparalleled in the private sector.

Conversely, any benefit derived from granting immunity to these privately employed prison guards will clearly inure to the financial benefit of their employer, a for-profit corporation, not to the government. Immunity under these circumstances serves none of the governmental interests previously identified by the Court. For instance, suits against a government contractor will not expose the government to litigation expenses, or divert "official energy from pressing public issues," or "deter able citizens from accepting public office." *See Harlow v. Fitzgerald, supra,* 457 U.S. at 814.

Assuming *arguendo* that the government's interest in the "unflinching discharge" of public duties can be extended to government contractors, AFGE asserts that the threat of a lawsuit is less likely to influence the conduct of the employees of corporate giants such as the Corrections Corporation of America, than that of a lone public employee. Moreover, if the contractor does pass the cost on to the government, as suggested, then the threat of a lawsuit will have virtually no impact on its willingness to fulfill its contractual obligations with the requisite vigor.[7]

[7] This Court has recognized that Congress is in the best position to make such policy determinations in the area of immunity. *See e.g., Westfall v. Erwin,* 484 U.S. 292, 300 (1988). Yet, Congress has not extended governmental immunity to federal contractors, which strongly suggests that it does not believe the federal government to be hampered in its contracting out efforts by the prospect of contractor liability for unconstitutional conduct.

In sum, granting qualified immunity to petitioners would increase the risk of unconstitutional conduct, without obtaining any additional assurance that the government's interests would be served. Under these circumstances, the balance weighs heavily in preserving what may be the only realistic mechanism for deterring unconstitutional conduct by private prison guards.

CONCLUSION

Based upon the foregoing reasons, Amicus American Federation of Government Employees, AFL-CIO, respectfully requests that the Court affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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